IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

CRIMINAL REVISION APPLICATION NO.240 OF 1999

Anant Babi Rahate)
Age - 70 years,)
Address : M/s. Gajanan Prasad)
Trading Company,)
At Post & Taluka Sangameshwar)
Dist. Ratnagiri.).. Applicant.

Versus

1) The State of Maharashtra)
2) Shri K. V. Sankhe,)
Food Inspector, Ratnagiri.).. Respondents.

Mr. S. V. Kotwal for the Applicant.
Ms.M.M.Deshpande, APP for the State.

CORAM : D. G. KARNIK, J.

DATED : 17TH DECEMBER, 2007.

JUDGEMENT:

Heard learned Counsel for the applicant and the

learned APP for the State.

2. By this revision application, the applicant challenges the judgment and order dated 4th October, 1999 passed by the Additional Sessions Judge, Ratnagiri, in Criminal Appeal No.2 of 1998 confirming the decision dated 3rd January, 1998 of the Judicial Magistrate, First Class, Deorukh, in Criminal Case No. 97 of 1995 convicting the applicant of the offence punishable under Section 7(i) read with Section 18 of the Prevention of Food Adulteration Act, 1954 (for short "the Act") and sentencing him to suffer S.I. for 6 months and to pay fine of Rs.5,000/- and in default to suffer further S.I. for six months.

3. The facts in brief are that on 25th October, 1994 the complainant, the Food Inspector appointed under the Act went with one Mr. Madhukar Jagannath Gadade to the shop of the applicant at Sangameshwar. The applicant, who is proprietor of the shop, was not present but an employee was present. The complainant disclosed his identity and after inspecting the shop he purchased 750 gms. of "chana-dal", paid the price and decided to send it for test and analysis. He divided the chana-dal into three parts, each of which was sealed in a separate container. The complainant also purchased other items and sent them for test and

analysis but no offence has been registered in respect of the other items purchased. After sealing the containers of chana-dal in accordance with the rules and taking signature of the employee of the applicant on the slips with which the containers were sealed, the complainant sent one part of the sample to the Public Analyst for examination. The remaining two parts of the sample contained in two containers were retained by the complainant. The report of the Public Analyst dated 28th November, 1994 showed that the sample of the chana-dal was not in accordance with the standard prescribed under the Prevention of Food Adulteration Rules, 1955 (for short "the Rule"), in as much as weevilled grains count was 4.23% and Uric acid was 320 mg. per Kg. Both of these were more than the standard prescribed. All other parameters were within the permitted limit.

4. On receipt of the report of the Public Analyst the complainant launched the prosecution before the Judicial Magistrate, First Class at Deorukh and forwarded a copy of the result of the examination of the Public Analyst to the applicant. Thereupon the applicant made an application under Section 13(2) of the Act requesting the Court to direct the complainant to send the remaining samples kept by him to the Central Food Laboratory for analysis. By his order

dated 21st September, 1995 the Magistrate directed the complainant to produce the sample/s kept by him to the Court within five days. The complainant forwarded the other two samples to the Court. The Court vide letter dated 4th October, 1995 forwarded the second part of the sample to the Director, Central Food Laboratory, Ghaziabad for analysis. The Director of the Central Food Laboratory forwarded a Certificate dated 20th November, 1995 giving result of the analysis of the sample sent to him. The Certificate dated 20th November, 1995 of the Director of the Central Food Laboratory, Ghaziabad states that the sample (bearing serial No.671) was received in a condition fit for analysis and was analysed by him which showed the Weevilled grains to the extent of 17.35%. Live and dead insects were also found in the sample. Presence of uric acid, however, was not detected. The report of the Director of the Central Food Laboratory showed that the sample was not within the parameters prescribed by the Rules in as much as weevilled grains were 17.35% and damaged grains were 7.41% both of which were more than the standard prescribed.

5. Upon considering the evidence adduced before him, the learned Magistrate came to the conclusion that the chana-dal stocked and sold by the applicant was not as per the standard prescribed under the Rules and was

therefore adulterated within the meaning of Section 2(ia) of the Act read with Rule 5 of the Rules. In this view of the matter, the learned Magistrate convicted the applicant and sentenced him to suffer simple imprisonment (S.I.) for six months and to pay fine of Rs.5,000/- and in default further S.I. of six months.

6. On appeal by the applicant, the learned Sessions Judge set aside conviction of the applicant under one head but confirmed the conviction for offences under Section 2(ia)(a), 2(ia)(m) of the Act read with Rule 5 and imposed sentence of S.I. for 6 months and fine of Rs.5,000/-.

7. Learned Counsel appearing for the applicant submitted that there was gross delay in giving copy of the first report of the Public Analyst to the applicant resulting into miscarriage of justice. The sample in question was taken by the complainant on 25th October, 1994 and was sent to the Public Analyst for analysis on 26th October, 1994. Though the report of the Public Analyst was received on 28th November, 1994, the prosecution was instituted only on 16th September, 1995. A copy of the report of the Public Analyst was forwarded to the applicant thereafter on 18th September, 1995. Immediately on receipt of the

copy on 21st September, 1995 the applicant requested to the learned Magistrate to send the second part of the sample for analysis to the Director of Central Food Laboratory, Ghaziabad. The second part of the sample was sent to the Director of the Central Food Laboratory by the Magistrate under the letter dated 4th October, 1995. Thus, the second part of the sample was sent to the Director of Central Food Laboratory for analysis after 11 months and 10 days. This gross delay has not been explained by the prosecution. Learned Counsel for the applicant also invited my attention to the report of the Public Analyst which shows presence of the weevilled grains to the extent of 4.23%. The weevilled grains had gone up to 17.35% by the time the sample was examined by the Director of Central Food Laboratory. The Director of Central Food Laboratory has also noticed the presence of live and dead insects in the sample which were not noticed by the Public Analyst. Mr. Kotwal, submitted that this clearly shows the samples were not properly preserved by the complainant while they were in his custody. The insects must have entered the containers in the intervening period. The seals put on the samples were defective and improper and must not be in tact which permitted the insects to enter the containers and damage the grains. It is because of this that the weevilled grains increased from 4.23%

to 17.35% between the period when the Public Analyst first examined one part of the sample in November 1994 and the Director of Central Laboratory examined the second part of the sample in September / October, 1995. The Concise Oxford dictionary defines the word "weevil" as *(1) any beetle of the large family Curculionidae or a related family, with its head extended into a beak or rostrum, including may pests of stored grain etc. (2) any insect damaging stored grain.* Learned Counsel submitted that the insects entered the sample during the time when the second and third parts of the sample were stored by the Food Inspector causing damage to the stored grains. In the circumstances, submitted Mr. Kotwal, the report of the Director of the Central Food Laboratory could not be a report of the contents of the sample at the time when it was purchased. Deterioration of the grains was caused by eating of the grains by the insects. There were no insects in the grains when the samples were taken (as can be seen from the report of the Public Analyst) while both dead as well as live insects were found in the second part of the sample at the time of analysis by the Director of Central Food Laboratory. Counsel submitted that if the complainant had kept the sample in air tight sealed containers the insects could not have entered the containers. The learned Counsel submitted that report of the Public

Analyst showed no living insects in the sample while report of the Director of Central Food Laboratory showed presence of both dead as well as live insects and therefore it may be held that the containers were not sealed properly and the insects entered the containers in the intervening period of 11 months.

8. Mr. Kotwal, invited my attention to the noting/order made by the learned Judicial Magistrate on 30th September, 1994 below the letter of the complainant producing before the Magistrate him the two sealed containers. The noting/order reads thus:

> "Received 2 packets of sample. One be sent to Lab. (Central Food Laboratory). Other be sent to Pub.H.Aut.(Public Health Authority)."

Learned Counsel also took me to the Roznama dated 30th September, 1995 and submitted that neither the order referred to above nor the Roznama shows that the learned Magistrate had inspected the containers containing samples and especially the seals on the said containers. He then invited my attention to sub-section (2B) of Section 13 of the Act, which reads thus:

> "(2B) On receipt of the part or parts of the sample from the Local (Health) Authority under sub-section (2A), the court shall first ascertain that the mark and seal or fastening as provided in clause (b) of sub-section (1) of section 11 are intact and the signature or thumb impression, as the case may be, is not tampered with, and despatch the part or, as the case may be, one of the parts of the sample under its own seal to the Director of the Central Food Laboratory who shall thereupon send a certificate to the court in the prescribed form within one month from the date of receipt of the part of the sample specifying the result of the analysis."

Under Sub-section (2B) of Section 13 of the Act, on receipt of the part or parts of the sample from the Local Health Authority the Magistrate firstly is required to ascertain that the mark and seal or fastening as provided in clause (b) of sub-section (1) of section 11 are intact and is secondly required to satisfy itself that the signature or the thumb impression, as the case may be, thereon is not tampered with and thirdly, is then required to despatch the part or one of the parts of the sample

under his own seal to the Director of Central Food Laboratory. Counsel submitted that the Magistrate did not inspect the samples received from the complainant nor did he verify whether the seals and the signatures of the applicant (in the present case of the employee of the applicant and the complainant thereon were not tampered with. Counsel submitted that in any event there was no record to show that the Magistrate complied with the provisions of sub-section (2) of section 13 of the Act. He, therefore, submitted that all this has resulted into miscarriage of justice and the applicant has been deprived of a very valuable right of getting the second part of the sample preserved in the same condition before it was sent for analysis by the Central Food Laboratory. Therefore, submitted Mr. Kotwal, in the report of the Director of Central Food Laboratory was vitiated and the applicant was thereby deprived of the opportunity to have his sample examined by the Director of the Central Food Laboratory, in the manner and in accordance with the provisions of law. Consequently, the applicant was entitled to acquittal. In support of his submissions learned Counsel relied upon the decision of the Supreme Court in **Municipal Corporation of Delhi v/s Ghisa Ram**, reported in AIR 1967 SC 970.

9. In Municipal Corporation of Delhi v/s Ghisa Ram

(supra) the facts were that on 20th September, 1961 the Food Inspector of the Municipal Corporation of Delhi visited the shop of the respondent and took a sample of curd, which was sent for analysis to the Public Analyst who carried out the analysis on 3rd October, 1961 and gave certificate on 23rd October, 1961. The complaint was filed before the Magistrate on 23rd May, 1962. On 4th October, 1963 the respondent applied that the sample which had been given to him by the Food Inspector (as per the Rules in Delhi) be sent for examination to the Director of the Central Food Laboratory. The same was accordingly sent to the Director of the Central Food Laboratory, who on examination reported that the sample was highly decomposed and no analysis was possible. Thereupon the respondent was acquitted by the High Court. The acquittal was challenged before the Supreme Court. The Supreme Court held that the report of the Director of the Central Food Laboratory is conclusive and accused has a right to get the sample tested from the Central Food Laboratory, whose report, when received, supersedes the report of the Public Analyst. If the sample is decomposed on account of the long delay in sending of the sample to the Director of the Central Food Laboratory for no fault of the accused, the accused is seriously prejudiced in his defence and it would not be proper to uphold his conviction. While

confirming the decision of the High Court, the Supreme Court observed:

> "*This is, therefore, clearly a case where the respondent was deprived of the opportunity of exercising his right to have his sample examined by the Director of the Central Food Laboratory by the conduct of the prosecution. In such a case, we think that the respondent is entitled to claim that his conviction is vitiated by this circumstance of denial of this valuable right guaranteed by the Act, as a result of the conduct of the prosecution.*"

In my view, the decision of the Supreme Court in Municipal Corporation of Delhi v/s Ghisa Ram **(supra)** is distinguishable on facts. In that case the Director of the Central Food Laboratory had opined that the sample was decomposed and it was not possible to analyse it. Therefore, in that case there was a denial of opportunity to the accused to have the sample analysed from the Director of the Central Food Laboratory. In the present case the Director of the Central Food Laboratory has not reported that the sample was so deteriorated that it was incapable of analysis. The Director of Central Food Laboratory

could and he did carry out the analysis and submitted his report. In Municipal Corporation of Delhi v/s. Ghisa Ram **(supra)** itself the supreme Court has observed:

> "The report of the Public Analyst, as we have said earlier, does not cease to be good evidence merely because a certificate from the Director of the Central Food Laboratory cannot be obtained. The reason why the conviction cannot be sustained is that the accused is prejudiced in his defence and is denied a valuable right of defending himself solely due to the deliberate acts of the prosecution."

In that case the delay had resulted into the sample getting decomposed and unfit for analysis by the Director of the Central Food Laboratory. In the present case the sample has not been found to have deteriorated and the analysis was possible by the Director of the Central Food Laboratory. Therefore, the case, in terms is not applicable to the facts of present case.

10. There, however, appears to be some justification in the contention of Mr. Kotwal that the learned

Magistrate failed in his duty cast upon him under sub-section (2B) of section 13 of the Act. Sub-Section (2B) of Section 13 casts a duty on the Magistrate to first ascertain that the mark and seal on the container of the second sample is intact. It also casts duty on the Magistrate to ensure that the signature or the thumb impression, as the case may be, on the container containing sample is not tampered with. Ordinarily, if the Magistrate does the check, there must be some record that he has done this. Such record may be made in the order which he passes for sending sample to the Director of the Central Food Laboratory or it may be made in the Roznama or on the complaint itself. Such a noting should be found in the record of the case itself because there is no way subsequently for the superior court to ascertain whether the Magistrate had complied with his duty under sub-section (2B) of section 13 of the Act. In the absence of any record that the learned Magistrate performed his duty, the submission made by the learned Counsel for the applicant that the containers were not properly sealed cannot be brushed aside lightly. In his report the Public Analyst undoubtedly has reported the presence of weevilled grains to the extent of 4.23% but has not reported any presence of living insects. The weevilled grains noted by the Director of the Central Food Laboratory were to the extent of

17.35%. Thus more than 13% of the grains (difference between 17.35% and 4.23%) were infected and weevilled because of the damage by the living insects during the period of 11 months. This clearly shows that the applicant was prejudiced because of the delay caused in launching the prosecution. The delay was certainly not caused by the applicant and he was prejudiced because of the delay.

11. There is one more reason why the applicant is entitled to acquittal. Letter dated 4th October, 1995 by which the learned Magistrate forwarded the sample to the Director of the Central Food Laboratory states that the sample was wrapped by him in accordance with the Rules and was numbered as: "Serial No.761". The report of the Director of Central Food Laboratory shows that the sample which was analysed by him bore: "Serial No.671". Thus, the sample number which was sent by the learned Judicial Magistrate and the sample number of the sample analysed by the Director of Central Food Laboratory are different. The sample analysed by the Director of the Central Food Laboratory is not part of the sample taken by the complainant and analysed by the Public Analyst or the sample sent by the Magistrate. The report of the Director of the Central Food Laboratory, therefore, cannot be said to be the report of the sample taken

from the shop of the applicant. As there is no valid report of the Director of Central Food Laboratory, though the applicant had applied in time, he is entitled to be acquitted.

12. Learned Counsel for the applicant also invited my attention to the fact that the sample was sent to the Director of Central Food Laboratory vide letter of the learned Magistrate dated 4th October, 1995 and the report mentioned that the same was received by him on 13th October, 1995. The Director of the Central Food Laboratory analysed the sample and prepared the report on 20th November, 1995 i.e. after the expiry of one month. Sub-section (2B) of section 13 of the Act requires the Director of the Central Food Laboratory to send his report in the prescribed form within one month from the date of receipt of the part of the sample. This has not been done. The learned Counsel for the applicant submitted that period of one month is mandatory. In view of the fact that accused is entitled to an acquittal on another ground, it is not necessary to express any opinion on this aspect.

13. For the reasons stated above, the revision is allowed. The impugned judgment and order is set aside and the applicant is acquitted of all charges. Bail bond stands cancelled.

Sd/-

(D.G.KARNIK, J.)